Supreme Court, U.S.
FILED
MAR 14 1996
CLERK

No. 95-1345

In The

Supreme Court of the United States

October Term, 1995

RICHARD B. BERGER and JOANN BERGER,

Petitioners,

vs.

CITY OF MORGAN HILL, a Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Sixth Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

PETER W. DAVIS*
KATHY M. BANKE
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
1999 Harrison Street
Oakland, CA 94612
(510) 763-2000

Attorneys for Respondent City of Morgan Hill

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

TABLE OF CONTENTS

Page

I PRELIMINARY STATEMENT 1

II STATEMENT OF THE CASE 4

III THE CALIFORNIA COURT OF APPEAL CORRECTLY REJECTED PLAINTIFFS' FEDERAL "TAKINGS" CLAIM 4

IV CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Adickes v. Kress & Co., 398 U.S. 144 (1970) 3

Agins v. Tiburon, 447 U.S. 255 (1980) 6

Austin v. City and County of Honolulu, 840 F.2d 678 (9th Cir.), cert. denied, 488 U.S. 852 (1988) 9

Commercial Builders of No. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992) 6

Delta Airlines v. August, 450 U.S. 346 (1981) 3

In re Park Beyond the Park, 157 B.R. 887 (9th Cir. BAP 1993) 6

Jama Const. v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991), cert. denied, 503 U.S. 919 (1992) 9

Kinzli v. City of Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), cert. denied, 484 U.S. 1043 (1988) 9

Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) 6

Lucas v. So. Carolina Coastal Council, 505 U.S. ___, 120 L.Ed.2d 798 (1992) 6

Sisson v. Ruby, 497 U.S. 358 (1990) 3

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9, 10, 12

Statutes

42 U.S.C. § 1983 ..... 1, 2, 11, 12

S. Ct. R. 10(b) 4

S. Ct. R. 10(c) 4

I

PRELIMINARY STATEMENT

The question presented to the Court bears little semblance to the case plaintiffs Richard and JoAnn Berger filed and pursued in the California state courts. The gravamen of their case was that the City of Morgan Hill breached an oral agreement purportedly made 30 years ago by an assistant City administrator. Specifically, they claimed they were promised a host of development concessions – including that the City would abandon an adjacent public road and allow that property to revert back to them, eliminate the standard street and utility improvements required for their subdivision, waive all development fees in perpetuity, and cooperate with any and all development plans, including giving them zoning – all in exchange for a 20 foot-wide, underground sewer line easement just inside the boundary of their property.

The City denied that any employee ever made such a deal with plaintiffs. City records showed that the only proposed agreement was a $3000 credit against development fees, which plaintiffs received. It was undisputed, in any case, that the City Council never approved any agreement of the sort claimed by plaintiffs. The California Court of Appeal accordingly held in an unpublished opinion that under California law the alleged oral agreement was the "consummate ultra vires act" and directed that judgment be entered for the City. The California Supreme Court denied plaintiffs' request for review.

Plaintiffs also pursued a host of other claims early in the case, including a federal "takings" claim asserted under 42 U.S.C. section 1983 and a state law "inverse

condemnation" claim. These claims were largely identical and focused principally on plaintiffs' contention that the City had "taken," *not* the underground sewer line easement (the value of which was *de minimis*), but the *rest* of their 5.7 acre parcel. Although the City never used or possessed the rest of their property and they lost it through foreclosure, plaintiffs claimed a "taking" had nevertheless occurred (a) because of an agreement deferring the street and utility improvements required under their subdivision map and (b) because no deed for the underground sewer line easement was recorded. The trial court dismissed these "takings" claims, and the California Court of Appeal affirmed on multiple grounds.

Plaintiffs now assert that this predominately state law case presents a burning federal question that should be considered by this Court – whether the requirement that state compensation procedures must be pursued before a federal "takings" claim can be stated, impermissibly imposes an exhaustion of administrative remedies requirement on "takings" claims made actionable under 42 U.S.C. section 1983. This question, however, is not properly presented by this case.

To begin with, plaintiffs never raised this question at any stage of the state court proceedings below. Rather, the only argument they ever made was that their federal "takings" and state law "inverse condemnation" claims were not barred by state law immunities. The California Court of Appeal agreed with plaintiffs on this point, but held that their federal and state "takings" claims were legally deficient for numerous other reasons, including that they simply failed to allege a cognizable "taking." Plaintiffs did not seek review by the California Supreme

Court of the rejection of their federal "takings" claim. Accordingly, they did not preserve the question they now proffer for consideration by this Court. *E.g., Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Furthermore, plaintiffs' federal "takings" claim is legally and incurably defective for two threshold reasons, and the question they present therefore would never be reached. First, they failed to allege a cognizable "taking" as the California Court of Appeal ruled. Absent a "taking," of course, there can be no viable "takings" claim. Second, they failed to allege that they had procured a "final" determination by the City, since they never sought clarification of or an exception from the actions about which they later complained. Each of these problems independently renders plaintiffs' federal "takings" claim legally unsustainable. Whether their claim fails for yet a third reason, because they also did not pursue state law compensation procedures, adds nothing to the equation in this case.

Finally, plaintiffs cite no authority in support of their unpreserved, eleventh hour argument that the well established requirement that state law compensation procedures must be pursued before a federal "takings" claim can be stated, is inapplicable where state law compensation procedures include administrative, as well as judicial, remedies. Indeed, plaintiffs' argument reflects a fundamental misunderstanding of the purpose and import of this requirement.

In sum, the California Court of Appeal did not go astray in rejecting plaintiffs' federal "takings" claim along with all the other meritless claims they pursued in this case. The unpublished California decision does not create a conflict on any federal issue. Nor did the state court purport to decide any vital federal issue of first impression. On the contrary, it duly applied well established federal precedent in disposing of plaintiffs' "takings" claim. There is no issue in this predominantly state law case that merits consideration by this Court, and plaintiffs' petition for writ of certiorari should be denied. *See* S. Ct. R. 10(b) and (c).

II

STATEMENT OF THE CASE

The California Court of Appeal's opinion adequately sets forth the facts for purposes of this petition. Plaintiffs' frequent and ebullient departure from the facts as stated by the state court reflects their obdurate refusal to acknowledge the facts as shown by the record. It is the record, however, and not plaintiffs' fanciful and unproven accusations that are controlling.

III

THE CALIFORNIA COURT OF APPEAL CORRECTLY REJECTED PLAINTIFFS' FEDERAL "TAKINGS" CLAIM

Plaintiffs' asserted "takings" claim had two prongs. They first alleged that an agreement they signed deferring the standard street and utility improvements

required for their subdivision constituted a "taking" of their entire 5.7 acre parcel. (App. 63-65)[1] Secondly, they alleged that the lack of a recorded deed for the underground sewer line easement created a "cloud" on title, again resulting in a "taking" of all of their property.[2] (App. 63-65) The California Court of Appeal first examined whether these allegations stated a cognizable "taking" and correctly concluded that they did not. (Pet.App. 26-27)

The deferred improvement agreement did not constitute a "taking" for at least two reasons. First, that agreement did not impose *any* conditions on plaintiffs' four-lot subdivision. Rather, it merely *deferred* the standard street and utility improvements required by the City Council as a condition of its approval of plaintiffs' subdivision. (App. 553-55)

Second, even considering the standard street and utility improvements required by the Council, the

---

[1] "App." citations are to the Appellant's Appendix filed in the California Court of Appeal and containing the relevant pleadings and documents. "RT" citations are to the Reporter's Transcript filed in the California Court of Appeal. "Pet.App." citations are to appendix to plaintiffs' petition for writ of certiorari.

[2] They never alleged, as part of their federal "takings" claim, that the City had "taken" the easement for the underground sewer line. While they initially included such a claim as part of their state law "inverse condemnation" claim [App. 70-71], they voluntarily dismissed it when the trial court rejected their deferred-improvement-agreement and cloud-on-title "takings" theories for the *rest* of their property, since the value of the easement itself was *de minimis* [RT 95].

improvements were rationally related to plaintiffs' proposed development and did not deny them all economically viable use of their property. *See Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798, 812-15 (1992); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). On the contrary, standard street and utility improvements, like those required by the City Council, are the *sine qua non* of permissible regulatory conditions on development. *E.g., In re Park Beyond the Park*, 157 B.R. 887, 890 (9th Cir. BAP 1993) (developer required to provide additional parking); *Commercial Builders of No. Cal. v. City of Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (non-residential developments required to pay fees offsetting housing costs of low-income workers); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (developer required to make off-site improvements to ameliorate erosion and other environmental effects of proposed development). It therefore comes as no surprise that plaintiffs have ***never*** cited a single case, either in the courts below or in their petition, that so much as suggests that an agreement deferring standard street and utility improvements constitutes a "taking" of the subdivided property served by those health and safety related improvements.

Plaintiffs' contention that the deferred improvement agreement misstated the standard street and utility improvements required by the City Council – because it allowed the improvements to be required all at one time, rather than on a lot-by-lot basis as plaintiffs developed the property – does not change the analysis. Whether required when the first of the four lots was developed, or on a lot-by-lot basis, the standard street and utility

improvements were rationally related to the planned commercial development of the property, did not deprive plaintiffs of all economically viable use of the property, and did not conceivably constitute a "regulatory taking."[3] *See* cases cited, *supra*, at 6.

Nor was the deferred improvement agreement inconsistent with the City Council's approval of plaintiffs' subdivision. When it approved their subdivision, the City Council did ***not*** specify that the standard improvements were only to be made on a lot by lot basis as each was developed. (App. 598, 601) The Council subsequently made deferrals of some of the improvements, first, in connection with the conditional use permit for the restaurant (deferring the improvements on the remaining lots) and, second, in connection with the conditional use permit for the bowling alley (continuing the deferral of some improvements). (App. 587, 588, 598, 601) But there was *never* any requirement in the subdivision approval that it do so. (*Compare* App. 599, 601, *and* 587, 588, 598, 601)

---

[3] In fact, only the improvements for one of the four lots was even in dispute. Plaintiffs began developing one lot with a restaurant as soon as their subdivision was approved. (App. 598, 601) They later proposed developing two more lots with a bowling alley [App. 581, 582, 587, 588], which under their theory, would have necessitated making the improvements for those lots. Their claim accordingly boiled down to the contention that the deferred improvement agreement incorrectly required them to make the improvements for the single remaining lot at the time they planned to complete commercial development of three-quarters of the property. Again, this did not come close to being a regulatory "taking" of plaintiffs' property.

Plaintiffs' "no-recorded-deed-cloud-on-title" takings theory was even more far fetched. Again, they have *never* cited a single case supporting the notion that the lack of a recorded deed of a sewer line easement results in a "taking" of the *rest* of the property.[4] Nor could they allege that the supposed "cloud" destroyed all economically viable use of the property. Not only did they continue to maintain a restaurant on the property, they also obtained permission to develop a bowling alley.[5] Thus, they retained substantial use of the property, foreclosing any federal "takings" claim. *See* cases cited, *supra*, at 6.

The California Court of Appeal could have rested its decision entirely on the ground that plaintiffs failed to state a cognizable "taking," since a "taking" is an essential requisite of a "takings" claim. The appellate court

---

[4] Furthermore, although plaintiffs denied knowing that the sewer line had actually been installed, they always knew the general location of the easement, even without having given a deed. They were told the City needed an easement to go around a water well in the street where the sewer line was being installed [RT 1082, 1122-23], and they signed a temporary construction easement which specifically made reference to an attached map and legal description of the sewer line easement [App. 611, 616, 617]. Thus, it was clear from the beginning that the easement was just inside their property line along the street in question.

[5] Plaintiffs' claimed inability to proceed with the bowling alley because of a lack of financing, had *nothing* to do with the recording of a deed for the sewer line easement. Rather, they attributed that problem solely to their obligation to make the standard street and utility improvements required by the City Council. (RT 304-05, 330-31, 591-92, 1282-83, 1510, 1530) *See* discussion, *supra*, at 5-7.

went on to observe, however, that plaintiffs' alleged claim also failed to meet the "ripeness" requirements for a federal "takings" claim. (Pet.App. 27-28) In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194 (1985), the Court held that a federal "takings" claim is subject to two "ripeness" requirements: (1) the public entity must have reached a "final" decision regarding the property, and (2) the owner must have been denied compensation under the procedures provided by state law. These "ripeness" requirements are additional elements of a federal "takings" claim, and unless *both* are met, a federal claim is premature and must be dismissed. *E.g.*, *Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991), *cert. denied*, 503 U.S. 919 (1992); *Austin v. City and County of Honolulu*, 840 F.2d 678, 682 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988). Plaintiffs did not, and could not, allege compliance with either requirement.

The requirement that there be a "final" decision concerning the property insures that the public entity has taken the last step possible with respect to the matter in question, so that the courts know exactly the burden which the entity intends to impose on the property. *E.g.*, *Williamson Planning Comm'n*, 473 U.S. at 190-91. Thus, a property owner must, for example, attempt to obtain a variance before complaining that a zoning ordinance deprives property of all economically viable use. *Id.* at 187-94; *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). Here, plaintiffs never returned to the City Council to ask for clarification or a correction of the deferred improvement agreement. Likewise, they never attempted to tender a deed of the easement. Nor did they ever ask the City

Council to prepare a deed any time prior to 1989 that they could execute, delineating the boundaries of the easement.

There is no merit to plaintiffs' argument, belatedly made here for the first time, that these available alternatives did not go to the "finality" of the challenged actions, but rather were "administrative remedies" to be invoked after a "final" determination. As the Court explained in *Williamson Planning Comm'n*, asking the *initial* decision-making body for reconsideration or modification is not the same thing as appealing a final decision to a higher body or state court. 473 U.S. at 193-94. Plaintiffs simply did not avail themselves of the readily available means to secure the "final" word of the City on the deferred improvement agreement or a deed for the sewer line easement.

The California Court of Appeal also could have rested its decision on the lack of any "final" decision by the City since that, alone, was another fatal shortcoming in plaintiffs' federal "takings" claim. *See* cases cited, *supra*, at 9. The state court noted, however, that plaintiffs' claim was defective for yet a third reason because they could not allege the lack of an adequate state procedure for providing "just compensation." (Pet.App. 28) As the Court explained in *Williamson Planning Comm'n*, 473 U.S. at 194-95, "[t]he Fifth amendment does not proscribe the taking of property; it proscribes taking without just compensation. . . . If a state provides an adequate procedure for seeking compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." Plaintiffs did not and could not allege that they had

already pursued a claim for "inverse condemnation" under state law. Accordingly, their federal "takings" claim was defective for this reason as well.

Plaintiffs argue, again for the first time, that this requirement should not have applied to their alleged federal claim because California's compensation procedures include pursuing administrative remedies. They maintain this imposes an impermissible "exhaustion requirement" on a section 1983 claim. Even if the other fundamental deficiencies in their federal "takings" claim, plus their failure to preserve the issue were all overlooked, plaintiffs misunderstand the requirement to pursue state law compensation procedures. The lack of "just compensation" is a *substantive* component of a federal "takings" claim, not an exhaustion requirement. *Id.* at 194-97. Thus, whether state compensation procedures require administrative, as well as judicial, proceedings does not excuse a plaintiff seeking to allege a federal "takings" claim from pursuing those procedures.

Finally, plaintiffs suggest, also for the first time, that they did not limit themselves to a "takings" claim, but also pursued an undefined "due process" claim that purportedly is not subject to the requirement to pursue state law compensation procedures. *Id.* at 197-200. Plaintiffs, however, cannot remanufacture their federal claim at this late date. It was pled and pursued throughout the state court proceedings as a "takings" claim, *i.e.*, "said taking has constituted a complete deprivation of the use of plaintiffs' property" (Third Amended Complaint [App. 64]), "such actions constituted the taking of all of Mr. Berger's property" (Cross-appellants' Opening Brief at 8), "when a city takes property . . . does it incur liability for

the loss of that property" (Plaintiffs' Petition for Review at 5), and the California Courts accordingly addressed and dealt with it as a "takings" claim. Plaintiffs cannot urge an entirely different approach now.

Furthermore, the Court in *Williamson Planning Comm'n* expressed substantial doubt about whether a plaintiff making a regulatory "takings" claim could relabel it a "due process" claim to avoid pursuing state compensation procedures. *Id.* at 198-99. Indeed, while plaintiffs purport to quote the Court as approving such a stratagem [Pet. 7-8], they have in fact quoted the Court's summation of the respondent's argument in that case, which the Court went on to question without resolving the issue. *Id.* at 197-99. This issue also cannot be resolved in this case, since it was never pled or pursued by plaintiffs.

IV

CONCLUSION

Plaintiffs ask whether the "ripeness" requirement to pursue state law compensation procedures impermissibly imposes an exhaustion of administrative remedies requirement on "takings" claims made actionable under 42 U.S.C. section 1983. But this question does not warrant the Court's attention. It was never raised below. It is irrelevant because plaintiffs' "takings" claim is legally

deficient for at least two other reasons. And it has no merit. The petition for writ of certiorari should be denied.

DATED: March 14, 1996.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

Peter W. Davis
Kathy M. Banke

Attorneys for Respondent
City of Morgan Hill